No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of California

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE APPELLEES

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 95 national and international labor organizations having a total membership of 13,000,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises a First Amendment question this Court has confronted only rarely, and to which the Court has not yet essayed a comprehensive answer: *viz*, whether and, if so, in what manner, the Constitution limits the authority of the government to foster communication among its citizens, where the governmental program doing so provides for the use in some fashion of property that is "private," at least in the sense that the property is not created through, or maintained from, government money.[1]

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[1] There is a great deal of discussion in the various briefs filed in this case as to whether the "extra space" in the utility billing envelope to which appellee Toward Utility Rate Normalization (TURN) has been granted access is in fact the property of the Pacific Gas & Electric Co. (PG&E), or rather, as the Public Utility Commission of the State of California (PUC) determined in an earlier proceeding, in some sense the ratepayers' property. Decision No. 93887 (1981), modified by Decision No. 82-03-047 (1983). *Compare Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 556 (1980) (Blackmun, J., dissenting) (suggesting that "[s]ince it is ratepayers who pay for the billing packet," a State may validly "define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders.")

It is our view that this discussion is a sterile one and that this case can, and should, be decided in favor of the appellees without either accepting or rejecting the PUC's 1981 decision as a binding determination of the nature of PG&E's "property" interest in the billing envelope or in the space within the envelope.

Whether the space in dispute is PG&E's or, in some sense, the ratepayers', it is certainly not the government's, nor does any party

The suggestions we make later in this brief concerning some of the principles which inform the proper answer to this generic question turn to a large degree on the nature of the use of private property the government

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contend otherwise. Indeed, any such contention would be unavailing, for the government, while closely regulating the billing envelope (*see* pp. 6, 11, *infra*), has not contributed any public funds or effort whatever to producing or sending out PG&E's bills. And the objective characteristics of the property in question—*viz.*, that the bill and the envelope are created through money paid by the ratepayers to PG&E, as to which PG&E is to a great extent assured reimbursement because of state ratemaking policies, and that the envelope is subject to an unusual degree of control by the State because of its integral role in public utility regulation (*see* p. 11, *infra*)—do not change depending upon whether one denominates the property that of PG&E or that of the ratepayers.

Moreover, whether or not the State's designation of property interests is conclusive for Fourteenth Amendment purposes (*see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, 52 L.W. 4886, 4890 (June 26, 1984)) does not necessarily settle whether that designation should decide the First Amendment issues in this case as well. The First Amendment protects not property as such but the system of free expression; whether title to the "extra space" in the billing envelope technically lies in PG&E or not has no direct relationship to whether PG&E's interest in free expression is compromised by the PUC access rule.

For example, PG&E relies heavily on *Wooley v. Maynard*, 430 U.S. 705 (1977). While we believe that the principles underlying *Wooley* have no application to this case (*see* pp. 19-24, *infra*), we also believe it extremely unlikely that the result in that case would have been different if the automobile in question had been borrowed or rented rather than owned by the plaintiffs. Similarly, we assume that PG&E would be raising the same First Amendment arguments in this Court if the PUC order had required TURN to pay a pro-rata share of the cost of mailing the billing envelope.

We therefore suggest that it is proper for the purposes of analyzing the question presented here to assume that the "property" at issue belongs for Fourteenth Amendment purposes to PG&E, as opposed to the ratepayers collectively or individually, at least until the envelope is mailed. (*See* Cal. Civil Code 3985 (a mailing envelope on receipt becomes the property of the recipient).)

proposes; upon the relationship between the individuals whose access to that property for communication is supported by the government, the complaining property owner, and the intended recipients of the communication; and the way in which the communication is related to an overall regulatory program.

We begin by exploring these factors in the context of this lawsuit. *See* part I *infra*. As we demonstrate, because PG&E is a natural monopoly, California has designated a commission to set reasonable rates as a substitute for having the market set the rates; and the State has charged the PUC with the responsibility of gathering the broad range of information necessary for such a complex economic decision. Over time, the PUC, in agreement with observers of utility regulation generally, has discovered that to fulfill its regulatory role there is a need for vigorous, informed ratepayer representation at its proceedings; otherwise, the agency is in danger of becoming the "captive" of the industry, because the utilities have the widest range of pertinent information and expertise. It is principally to aid in the development and effectiveness of this kind of ratepayer participation in the regulatory system that the PUC determined to grant TURN, an established representative of ratepayer interests, a limited right to insert TURN communications in the utility billing envelope. That envelope is the only regular means of communication to the ratepayer constituency as a whole, is charged to the ratepayers in figuring PG&E's costs, and contains notice of ratemaking proceedings as well as other PUC-prescribed informational inserts. The billing envelope is therefore the most natural means of communication among ratepayers.

In part II, *infra*, we discuss briefly the applicability of state action principles to this case. It is clear under this Court's precedents that the distinctive characteristics of PG&E and of the billing process—for example, the monopoly character of the utility and the consequent very close government supervision of the relationship between the

company and the ratepayers—do *not* combine to create a situation in which the utility is identified with the State for constitutional purposes. There is therefore no independent First Amendment right of ratepayers to communicate through the billing envelope. But the fact that the Constitution does not compel access does not mean that the government is without legislative power to provide access. The instant case present only one of several circumstances in which the government has determined to permit access to private property for a communicative purpose and in upholding governmental action that provides such access, this Court has not viewed state action determinations as in any way a limitation on the government's authority to do so.

Part III, *infra*, treats with the central constitutional claim raised by PG&E in this case—that the utility has a First Amendment right to refuse to allow TURN's access to the billing envelope, because the PUC order providing such access compels PG&E, contrary to its wishes, to support another's communicative activity. Upon examination, the First Amendment interest asserted to support this claim prove ephemeral. The right not to speak that this Court has recognized derives its force from the prong of the First Amendment which protects individual self-expression. As such, this inverse First Amendment right forbids governmental requirements that directly intrude into an individual's autonomy and do so in order to impose uniformity of belief. Where, as here, the complaining party is not an individual but a business corporation, the property to which access is provided is basically commercial property, and the access requirement is designed to advance rather than stifle a diversity of views, there is no interference with the rights protected by the First Amendment.

PG&E suggests, however, that this case involves more than its bare right not to speak since the utility uses the billing envelope for its own speech, in the form of its newsletter, the *Progress*. As we show in part IV, *infra*, however, this is not a case in which a speaker is being

relegated to a different forum; PG&E is permitted to continue transmitting its newsletter in the billing envelope. Nor is this a situation in which the right of access provided by the government depends upon PG&E having chosen to publish its newsletter. The reason for the access requirement—enhancing the PUC's regulatory process through more effective ratepayer participation—has nothing to do with PG&E's publication of the *Progress*, and the right of access does not in any way hinge upon whether PG&E publishes its newsletter or not. While it is true that the PUC order may result in higher costs to PG&E in transmitting the *Progress*, the First Amendment does not provide a *per se* guarantee against government regulations that have the incidental effect of increasing the costs of publishing. Thus, that order simply is not a "penalty" on speech prohibited by the First Amendment.

The final reason put forward by PG&E for invalidating the PUC order is that impermissible content and identity distinctions will inevtitably be involved in administering the right of access. As we discuss in Part V, *infra*, the need to set firm principles for selecting among groups and individuals seeking access to utility billing envelopes has not yet arisen. Thus, this consideration should influence the result in this case if and only if there is *no* possible selection principle that would be valid. But as this Court has had several recent occasions to reiterate, the First Amendment allows the government, in controlling access to property, other than a "traditional public forum," to select among those seeking to speak on the basis of such considerations as the underlying reasons for allowing access in the first place. Beyond the general principle that there are such valid criteria, there is no reason to go in this case. If and when an individual or group is denied access to the billing envelope and complains about the standards applied, there will be time enough to decide whether the particular standards used are valid or invalid.

ARGUMENT

I. The Role of Ratepayers and Ratepayer Representatives in Utility Regulation. PG&E is engaged generally in providing a public utility service; the generation and transmission of gas and electricity. That business is, because of its inherent characteristics, a natural monopoly.[2] For that reason, and because the services provided are often practical necessities in the modern world, public utilities, unlike private businesses in general, are precluded by law from selecting or discriminating among their customers. Instead a "utility is required to supply all reasonable demands for service by those who can pay for it." P. Garfield and W. Lovejoy, *Public Utility Economics* (1964) at 13. The regulation of the resulting supplier-consumer relationship, imposed as a substitute for competition, is pervasive, including all details of the utility's economic life. A particular focus of that regulation is setting the rates that consumers will be charged. The rate-setting process—which has been the subject of myriad cases in this Court—involves "the necessity of securing, organizing and weighing data adequate to make a complex economic decision [as the substitute for a] market [decision which] rests upon the action of many independent decision makers . . ." C. Phillips, *The Regulation of Public Utilities* (1984) at 154, *quoting* former FCC Commissioner Loewinger.

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[2] It is the general consensus of economists that the primary, even though not the sole, distinguishing feature of a public utility enterprise is to be found in a technology of production and transmission which almost inevitably leads to a complete or partial monopoly of the market for the service. Public utility regulation, if chosen in preference to outright public ownership, is therefore said to be a substitute for competition. [J. Bonbright, *Principles of Public Utility Rates* (1961) at 10]. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 n. 8 (1974) ("[P]ublic utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale. . . . Regulation was superimposed as a substitute for competition . . ."); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 383 (1973) (Stewart, J., concurring in part and dissenting in part).

Students of the commissions created to carry out this difficult regulatory task have found that these agencies often become over time so closely allied with the regulated companies as to be converted into an industry "captive." This occurs in part because the technical information and complex concepts that are the basis for ratemaking decisions are largely in the hands of the regulated companies. C. Phillips, *supra*, at 165; B. Mitnick, *The Political Economy of Regulation* (1980), at 95-96, 206 *et seq.* As Professor Mitnick explains:

> [I]n a partial theory explaining the development of a predisposition by regulators to make decisions and take actions consistent with the preferences of the regulated industry . . . [i]nformation plays a central role . . . The complexity of the industry's technology . . . means that the information needed to make regulatory decisions will be complex. The . . . expertise [the] industry also possesses . . . lead[s] to a condition of "information impactedness" between the industry and the regulatory agency . . . Information impactedness . . . and information complexity . . . can lead to industry control of the information needed for regulation [and thereby] to co-opting the regulators [by] making the regulators perceive the regulatory task through an information framework and orientation provided by the industry [B. Mitnick, *supra*, at 209-211. *See also Jackson v. Metropolitan Edison*, 419 U.S. at 363 (Douglas, J., dissenting) (discussing the "captive agency" problem and citing Federal Trade Commission, *Utility Corporation Report*, S. Doc. 92, 70th Cong., 1st Sess. (1936).]

California, in common with other States, has sought to counter these influences in part by encouraging broad ratepayer participation in the regulatory process.[3] To

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[3] *See*, for example, Cal. Pub. Utilities Code § 454 (emphasis supplied):

> (a) . . . Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to increase any rate of charge, other than an increase reflecting and

further that end, the PUC, after a careful review of its own regulatory procedures, concluded that the task assigned to the Commission by the State of setting rates and making other decisions concerning the essential services offered by public utilities could not be accomplished simply by hoping that individual ratepayers would be both motivated to assume the responsibility, and qualified for the task, of countering industry presentations. Rather, the Commission perceived the need—if the substitution of a broad-ranging inquiry into the relevant economic facts and concepts for market competition is to work—for a vigorous, informed ratepayer voice at its ratemaking and other proceedings:

> There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of that in deciding *Consumers' Lobby Against Monopolies (CLAM) v. Public Utilities Commission*, 25 C.3d 891 (1979), which found that the Commission has jurisdiction to award attorneys' fees and costs to consumer representatives

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passing through to customers only increased costs to the corporation, for the services or commodities furnished by it, *the corporation shall furnish to its customers affected by the proposed increase notice of its application to the commission for approval of the increase.* The corporation may include the notice with the regular bill for charges transmitted to the customers within 45 days of the 60-day billing cycle. The notice shall state the amount of the proposed increase expressed in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase, including a request by the customer to receive notice of the date, time, and place of any hearing on the application, may be directed.

* * * *

(c) . . . *The commission shall permit individual residential public utility customers affected by a proposed rate increase to testify at any hearing on the proposed increase,* except that the presiding officer need not allow repetitive or irrelevant testimony and may conduct the hearing in an efficient manner.

under certain circumstances. In reaching this conclusion, the Court noted:

> "[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing (Pub. Util. Code Section 1731) or judicial review (*Id.*, Section 1756) of Commission decision." (25 C.3d 891, 980.) [4]

We hasten to add that our staff is a dedicated professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings. . . .

Furthermore, while we believe that the opportunities for compensation for participation in our pro-

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[4] In the *CLAM* opinion, the California Supreme Court rejected as having "a hollow ring to it" the argument that "the commission staff adequately represents the public." 25 Cal.3d at 908. That court emphasized:

> [P]ublic interest intervenors such as TURN speak for a substantial segment of the population that otherwise may go unheard. As mentioned above, the communication staff cannot fully and adequately represent all facets of the public interest, and in some instances . . . may fail to discern the ratepayers' interests. Public interest intervenors therefore fill a gap in the ratemaking process.
>
> The special contributions of groups such as TURN must also be considered. Effective participation in complex commission hearings . . . requires technical expertise and continuous scrutiny of various proposals and rulings. Groups such as TURN provide that expertise and scrutiny as all counterweight to the views expressed by the utilities. [25 Cal.3d at 911.]

ceedings help assure the development of a full and fair record, we recognize the merit of the . . . contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor upon compensation under one of our present procedures. It appears that there are many ratepayers in [the] service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this . . . proposal. D.83-04-020, mimeo., pp. 7-8 [J.St.App. A-49; *see also id.* at A-160.]

On this basis, the Commission determined (J. St. App. A-49) to provide an opportunity for proven representatives of ratepayer interests to communicate with their ratepayer constituency through the only means of communication that regularly flows to that constituency, and that does so as a direct result of their status as ratepayers—*viz.*, the billing envelope each ratepayer receives monthly, and through which notice of ratemaking proceedings is transmitted.[5]

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[5] The PUC based its decision to allow TURN access in part on the ground that

> TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population . . . Furthermore, it has adequately demonstrated during this hearing that it cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship. [J.St.App. A-15.]

Further, the Commission has provided that all "funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E" (J.St.App. A-18), and that TURN is required "to prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process [describing] TURN's efforts on behalf of PG&E's residential ratepayers in the past year" (*id.*).

On the only occasion in which a group other than TURN sought access to utility billing envelopes, access was denied because

> The [applicant] Committee has not participated in our proceedings, and its complaint does not suggest that it ever will participate . . . Access to the billing envelope has . . . been granted to groups organized specifically to represent ratepayers in our proceedings. [Decision No. 84-10-062, J.St. App. A-160.]

The Commission's determination reflects the fact that the billing envelope is itself a product of the regulatory process, in the sense that the Commission requires that regular bills be sent, specifies what information must be included on the bills, may require more than one company to send joint bills in a single envelope, and has required utilities to include in the envelope various PUC-prescribed inserts providing information on many utility-related matters. *See* PUC Motion to Dismiss, at 10-14. The costs of billing and of the billing envelope are consequently considered operating costs of the utility, which means that, in calculating the rate base upon which PG&E's permitted rate of return is computed, those costs are included. J. St. App. 46. *See generally* P. Garfield & W. Lovejoy, *supra*, at 44-56. Because the United States Postal Service's minimum postage charge covers a mailing of up to one ounce of material, there may be extra space in the billing envelope after provision is made for all the PUC's basic billing and notice requirements. That space, whose use is at issue here, is therefore available without any additional cost. (There is, however, no guarantee that the bills themselves will not be so lengthy, or the required inserts in any one month so many, that there will be less than one ounce of PUC-required material in any particular billing envelope.)

II. The Relevance of State Action Principles. PG&E's contention here is that the extra space in the billing envelope, despite its genesis in PUC regulations and its inherently transitory nature, is the utility's private prop-

erty, and that the PUC is therefore precluded by the Constitution from designating this natural medium of communication to ratepayers as a means of promoting a vigorous presentation of all potentially useful viewpoints in the Commission's regulatory proceedings.

It is important, at the outset, to separate the question raised by that contention from the quite distinct question as to whether the First Amendment, of its own power, ever *requires* that individuals or groups be granted access to private property for communicative action. That question necessarily turns, as this Court has had several occasions to emphasize, on a determination as to whether there is, in either the character of the property involved or the nature of an applicable governmental regulatory scheme, sufficient state action to trigger application of the First Amendment. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). *See also Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94 (1973); *Marsh v. Alabama*, 326 U.S. 501 (1946).

In this instance, it is clear from this Court's precedents that there is nothing in PG&E's status as a public utility that would support the conclusion that the utility is *required* by the First Amendment to grant access to the billing envelope to any other person. This Court has made it plain that the actions of a public utility are not state actions:

> [That a company is] a heavily regulated, privately owned utility, enjoying a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the . . . Public Utility Commission found permissible under state law . . . is not sufficient to connect the State to [the company's] action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment. [*Jackson v. Metropolitan Edison*, 419 U.S. at

> 358; *cf. Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594 (1976) (public utility policy not instigated by the state is not within the state action immunity from the antitrust laws).]

However, while the state action issue is critical in determining whether access to the billing envelope is required by the First Amendment, that issue is in no way determinative of the separate issue whether a "statutory or common law [which] . . . extend[s] protection or provide[s] redress against a private corporation who seeks to abridge the free expression of others" (*Hudgens*, 424 U.S. at 513) is inconsistent with the Constitution. For example, this Court, after determining that there is no First Amendment right of access that overrides, in whole or in part, broadcast media restrictions on the purchase of broadcast time by private entities (*CBS v. DNC*, *supra*), later upheld as consistent with the First Amendment a congressionally-imposed requirement that federal candidates for office be permitted to purchase reasonable amounts of broadcast time. *CBS, Inc. v. FCC*, 453 U.S. 367, 394-397 (1981). Similarly, while restrictions imposed by shopping centers upon those who would engage in communicative activity are not state action and therefore do not violate the First Amendment, the Constitution does not prevent a State from deciding that its citizens' interests in free communication are best served if shopping centers are required to allow reasonable communicative activity. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). In short, the government has at least some power to enhance communication among the citizenry beyond that affirmatively protected by the First Amendment in a fashion that affects private parties' control over communication on their property.

Indeed, *Pruneyard* shows that certain of the considerations that have been advanced and rejected as a justification for a First Amendment right of access to property controlled by a private entity provide a valid justification for governmental action that enhances communication on private property. *Hudgens* rejected the proposition that

the fact that "a large shopping center is 'open to the public,' [and] serves the same purposes as a 'business district' of a municipality" (424 U.S. at 519, *quoting Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972)), is a ground for providing First Amendment protection to individuals seeking to engage in communicative activity on the shopping center. The shopping center owners' argument in *Pruneyard* that California may not, consistent with the First Amendment, require such owners to permit communicative activity on their premises, was, however, rejected in turn, in part because "the shopping center . . . is . . . a business establishment that is open to the public to come and go as they please." 441 U.S. at 87; *see also id.*, at 95 (White, J., concuring); *id.*, at 101 (Powell, J., concurring).

Thus, as we have seen, neither the natural monopoly status of public utilities, nor the pervasive governmental regulation of ratemaking generally, and of the billing process in particular, identify PG&E with the government sufficiently to fulfill the state action requirement. Nonetheless, those same factors may well be—and, we suggest, are in fact—pertinent considerations in determining whether or not PG&E is protected by a constitutional barrier when the government determines that the proper functioning of the public utility regulation system requires that communication among ratepayers concerning that system be enhanced by use of a medium—the billing envelope's "extra space"—generated and closely controlled by the PUC in the ratepayers' interest and paid for by the ratepayers.

III. The Claimed Absolute First Amendment Right Not To Further Another's Speech. PG&E does not suggest that the PUC access rule works any infringement of the utility's property interests that runs afoul of the Fourteenth Amendment. But PG&E's First Amendment contentions turn out to be, upon close examination, little more than restatements in another guise of the property-based arguments the utility has wisely decided not to

raise directly.[6] PG&E's central point is that by permit-

[6] The reasons there is no property rights infringement here are similar to those the Court found controlling in *Pruneyard*, and turn on both the nature of the property in question and the character of the access requirement.

PG & E's interest in the billing envelope is a very odd sort of property interest at best. "Extra space" in the envelope is a fortuitous by-product of two sets of governmental regulations—those of the PUC (requiring periodic billing and prescribing the contents of the billing envelope) and those of the Postal Service (setting the minimum postage rate on the basis of one ounce of material). As such, the "extra space" could be eliminated either by changes in PUC requirements—mandating, for example, more lengthy bills, or more informational inserts, or cost-saving devices such as semi-monthly billing or joint billing by several utilities—or by changes in Postal Service regulations—setting, for example, a new minimum rate for one-half ounce of material.

Moreover, PG & E's interest in the envelope itself is inherently transitory rather than permanent; the envelope is purchased in order to be mailed, and once mailed no longer belongs to PG & E but to the recipient, the individual at whom the TURN insert is directed. Cal. Civil. Code § 985.

Further, PG & E obviously has no cognizable interest in "excluding all persons [from] its property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982). The primary use of the property is to communicate commercial information in a manner prescribed by the government to another person, the ratepayer, rather than to use the property in a way permanently closed to others. And, for Fifth and Fourteenth Amendment purposes, no distinction can be drawn between a PUC-prescribed message and a PUC-prescribed inclusion of an individual's or a group's message.

Given this attenuated property interest, there is, as in *Pruneyard*, neither an uncompensated taking of property nor a denial of property without due process when the government creates a limited access right to serve substantial governmental interests.

First, there is no interference with "reasonable investment-backed expectations." *Pruneyard*, 447 U.S. at 84. The central and prescribed purpose of the billing envelope, is to convey the monthly bill PG & E is required to send. Postal rates are currently set by the ounce; PG & E therefore would have to pay for the full ounce to convey its bills even if the utility never included anything else in the envelope. Including the TURN inserts in no way interferes with the use of the envelope for billing purposes or increases the cost of billing. And, as we have seen, PG & E has no reasonable

ting TURN a limited right through the billing envelope to communicate with the ratepayers whose interests that association represents, the PUC violates the utility's First Amendment right not to further another's communicative activity. Brief for Appellants at 14. Presumably, by articulating this claim as one under the First Amendment rather than as one under the Fifth and Fourteenth Amendments, PG&E hopes to be the beneficiary of a stricter standard of scrutiny than is

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expectation that the utility will be assured use of any extra space in the billing envelope on a monthly basis for its own purposes unrelated to billing. In short, while PG & E may have a "unilateral expectation or an abstract need" to use the billing envelope to transmit its own newsletter without cost to the utility, that expectation, which is neither reasonable nor investment backed, cannot be deemed the "reasonable investment-backed expectation" protected by the Fourteenth Amendment. *See Ruckshaus v. Monsanto Co.*, —— U.S. ——, 52 L.W. 4886, 4891 (June 26, 1984).

Second, PG & E's interest in the billing envelope and the extra space within the envelope is, for the reasons surveyed above, inherently transitory and limited. There is therefore no meaningful sense in which a "permanent physical occupation" (*Loretto*, 458 U.S. at 434) of property of this kind can occur; any "invasion" is necessarily temporary, because the property interest *itself* is. Thus, in this case as in *Pruneyard*:

> Since the invasion was temporary and limited in nature, and since the owner has not exhibited an interest in excluding, all persons from [its] property, "the fact that [the inserts may have] 'physically invaded [PG & E's] property cannot be viewed as determinative." [*Loretto*, 458 U.S. at 434.]

Lastly, as in *Pruneyard*, there is no doubt that the substantive due process guarantee of the Fourteenth Amendment is satisfied: PUC's determination that effective regulation of utility rates is hampered by the industry's control of relevant information is, as we have seen, supported by the weight of scholarly opinion (pp. 6-7, *supra*); the Commission's further conclusion that this defect in the ratemaking process will be alleviated in part by encouraging development of effective ratepayer representatives through the medium traditionally used by the PUC itself to communicate with ratepayers is not unreasonable but, instead, manifestly has "a real and substantial relation" to the goal of effective utility regulation. *Pruneyard*, 447 U.S. at 85, *quoting Nebbia v. New York*, 291 U.S. 502, 525 (1934).

applicable under the latter. But First Amendment analysis differs to this degree from that pertinent under the property clauses because, and to the extent that, values entirely distinct from those that are denominated by the term "property" are at stake. And, as we now show, none of these separate First Amendment values are impaired by the PUC order at issue here.

This Court has not had the occasion to explore in any exhaustive way the appropriate relationship between the constitutional protection accorded the right to speak and that accorded the right not to speak. Rather, the Court has in a total of three cases upheld a claim based on that negative First Amendment right in light of the particular circumstances presented. (*Board of Education v. Barnette*, 319 U.S. 624 (1942); *Wooley v. Maynard*, *supra*; *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *see also Ellis v. BRAC*, —— U.S. ——, 52 L.W. 4499 (April 25, 1984)), while rejecting such a claim in two other instances (*Pruneyard*, *supra*; *Zauderer v. Office of Disciplinary Counsel*, —— U.S. ——, 53 L.W. 4587 (May 28, 1985).)

These few decisions are sufficient, however, to make it clear that in this context as in others, affirmative constitutional rights do not, in a mechanical fashion, automatically imply their precise obverse. *Compare*, *Singer v. United States*, 380 U.S. 24, 34-35 (1965); *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975). Zauderer, for example, was held to have broad rights under the First Amendment to advertise but was held also not to have the negative right to refuse to disclose state-prescribed information in those adversements. *Zauderer*, *supra*, 53 L.W. at 4549. And while the owner of the Pruneyard was constrained to permit political handbilling by others on his property, he presumably retains the affirmative right to use his own property to forward ideas he wishes to express. As these illustrations show, the design of the First Amendment supports implication of inverse rights only in the situations in which

the implication furthers that Amendment's large purposes.[7]

The two recognized purposes of the First Amendment are: (1) "'to secure the widest possible dissemination of information from diverse and antagonistic sources' [so as] 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by people'" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)); and (2) to protect and enhance "[t]he individual's interest in self-expression" (*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, n.12 (1978)).

The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from the "marketplace of ideas" purpose of the First Amendment. An individual who refuses to express his or her views is quite obviously not enhancing but contracting the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote.

PG&E does, to be sure, attempt to state its objection to the fact that ideas opposed to its own may be magnified in volume and importance through access to the billing envelope in terms that draw on the marketplace

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[7] Thus, even if *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), is read as granting plenary First Amendment protection to a utility's right to use a billing envelope for its own speech, that determination is not informative on the quite separate question whether the government has the authority to require that others be allowed the same privilege.

Indeed, it is far from clear that *Con Ed* grants utilities a plenary right to use billing envelopes for their speech. For *Con Ed* does not rule out the possibility that a utility commission could limit the billing envelope only to bills and prescribed notices, leaving *all* other utility communications to be sent separately. For the *Con Ed* decision emphasizes that, instead of doing so, the Public Service Commission engaged in the selective content-based regulation the First Amendment most certainly prohibits by banning *only* utiilty inserts concerning "controversial issues of public importance." 447 U.S. at 533, 535, 537-38.

of ideas principle. It is well-settled that in general the First Amendment does not permit government to "perfect" that marketplace by silencing some in order to enhance the relative voice of others. *Bellotti*, 435 U.S. at 791 n.30; *Buckley v. Valeo*, 420 U.S. 1, 49 (1976). It is therefore argued that by the same token the government may not upset the balance by subsidizing speech. That argument fails because the Constitution does not guarantee a marketplace of ideas financed solely through private capital.

Thus, in *Regan v. Taxpayers with Representation*, 461 U.S. 540 (1983), the Court refused to allow one lobbying group to end a government subsidy granted to another group for lobbying purposes. The Court emphasized that "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law . . . ." and that "[w]here governmental provision of subsidies is not aimed at the suppression of dangerous ideas . . . its power to encourage actions deemed to be in the public interest is necessarily far broader." 461 U.S. at 550. The same result would necessarily follow if any of the myriad varieties of governmental financial support for communicative activity were challenged by groups not so favored on the basis that their right to speak is hampered—at least in comparative terms—by the fact that others are enabled by governmental assistance of some kind to speak as well. For the marketplace distortion argument is particularly suspect where, as here, the purpose and effect of governmental action is "not to abridge, restrict or censor speech but rather . . . to facilitate an enlarged public discussion [and therefore to] further[] First Amendment values." *Buckley v. Valeo*, 424 U.S. at 92; *see also, Storer v. Brown*, 415 U.S. 724 (1974). In short, as this Court has held, the Establishment Clause of the First Amendment pertains only to religion, and not to speech generally. *Buckley v. Valeo*, 424 U.S. at 92.

It is, therefore, not surprising that the other set of First Amendment values, concerning the preservation

of individual integrity," has been the focus of the negative First Amendment rights cases. In *Barnette* the Court was concerned to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control" (319 U.S. at 642); and in *Wooley* the Court characterized the interest at stake as "the broader concept of 'individual freedom of mind'" (430 U.S. at 714). *See also Abood*, 431 U.S. at 234-35; *compare Elrod v. Burns*, 427 U.S. 347, 356-57 (1976).

Barnette and *Wooley* themselves make clear that it is not to be lightly inferred that governmental activity is aimed at imposing such "official control." Both cases expressly recognize that the First Amendment injury found in those cases does *not* arise simply from the fact that the government was sponsoring communicative activity with taxpayers' money. Thus, in *Barnette*, the Court stated: "National unity as an end which officials may foster by persuasion is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." 319 U.S. at 640. And, in *Wooley* as well, the Court recognized that where "The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism . . . the State may legitimately pursue such interests in any number of ways." 430 U.S. at 717. *See also Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *id.*, at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.* at 896-97 (Powell, J., dissenting); *id.*, at 909, 915 (Rehnquist, J., dissenting).

In *Prunyard* the Court began to define with some particularly the limits of the right not to speak and to give content to its consistent recognition that the government has the authority to enhance speech in ways that do not trench on that negative right. The *Prunyard* Court noted that " *Wooley* . . . was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used 'as

part of his daily life,' and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest." 447 U.S. at 87. And the Court characterized *Barnette* as a case that "involved the compelled recitation of a message containing an affirmation of belief." 447 U.S. at 88. And in upholding the California access rule at issue in *Pruneyard*, the Court explained

> Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law. [447 U.S. at 87.]

Following the path laid out in *Pruneyard* we now show that there are three critical factors which together demonstrate that the right protected in *Barnette*, *Wooley* and *Abood* is not involved here.

(a) PG&E is hardly in a position to claim infringement of its "sphere of intellect and spirit" or "freedom of mind." *Barnette*, 319 U.S. at 642. To ascribe to PG&E, a business corporation, an "intellect", a "spirit", or a "mind" is to confuse metaphor with reality. Corporations do, to be sure, enjoy the First Amendment's protection against government censorship. *Bellotti, supra.*

But the *Bellotti* Court declined the invitation to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment." 435 U.S. at 779, n.14. Rather, the Court there recognized that "Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against self-incrimination . . . or . . . the enjoyment of the right to privacy." *Id.*[8] As both *Bellotti* and *Con Ed* expressly recognize, and as the various opinions in *Bellotti* discuss at some length, a business corporation's First Amendment rights derive from "the inherent worth of the [corporation's] speech in terms of its capacity for information" (435 U.S. at 777), and *not* from "[t]he individual's interest in self-expression . . . a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge" (*id.*, at 777 n.12). *See also, id.* at 783 (emphasizing again that "the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *id.* at 894 (White, J., dissenting). In short, the nature of PG&E as an institution, like the nature of the shopping center as a location, negates any claim that a direct infringement on the property owner's intimate, personal rights is here involved.[9]

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[8] The two "purely personal" rights mentioned in *Bellotti* are closely allied in the values granted protection to the right recognized in *Wooley, Barnette* and *Abood*: All three are at bottom concerned with assuring a private enclase within which each individual may thrive and grow in heart and mind. *See Bellotti*, 453 U.S. at 779 and the cases cited there.

[9] While there is no need in this case to explore the question in detail, we would suggest, as did Justice White, for himself and Justices Brennan and Marshall, in his dissent in *Bellotti*, that corporations or associations organized in whole or in part for the purpose of engaging in communicative activity are in a different position with regard to the self-expression aspect of the First Amendment than are corporations organized as banks or public utilities:

> [A]s this Court has recognized, *NAACP v. Button*, 371 U.S. 415, there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. [453 U.S. at 805.]

Consequently, the observations in the text regarding the application of negative First Amendment rights are confined to ordinary business corporations, which are, at their core, economic institutions and not vehicles for enhancing individual expression.

We note as well that the individuals who work for or represent a business corporation certainly retain their inverse First Amendment rights. There may be situations in which a government-created access right for others intrudes impermissibly on the right of those individuals, as individuals, to refrain from speech; in this case, however, the billing envelope is in no way identified with any individual.

[10] PG&E has for some time chosen to include its newsletter, the *Progress*, in the billing envelope; we discuss the significance of that choice for this case at pp. 24-27, *infra*.

(b) This case involves not only a commercial organization but a fundamentally commercial, impersonal communication: an envelope carrying a statement of accounts, together with official regulatory announcements which PG&E is *required* by PUC rules to mail monthly.[10] The nature of these materials reflects the fact that the utility-ratepayer relationship itself is fundamentally a commercial relationship. As this Court recognized in *Zauderer, supra*, negative First Amendment rights are particularly weak when a basically commercial transaction and a basically commercial message are involved. In such a setting, there is no meaningful sense in which individual expression may be said to be compromised by

government regulation, and thus there is no basis for invoking the self-expression prong of First Amendment jurisprudence.

(c) The PUC's purpose in this case is at the furthest remove from the didactic purpose the government sought to pursue in *Barnette* and in *Wooley*. The Commission's goal is to provide a means of communication that increases the diversity of views expressed in order to enhance the proper functioning of its own regulatory proceedings. And those proceedings are a quintessential instance of a First Amendment governmental forum, albeit a limited one, whose very essence is the exchange of conflicting viewpoints. *Cf. Madison Sch. Dist. v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Indeed, the Commission's action here, far from creating a danger of official orthodoxy, is intended to decrease that danger by assuring that PG&E is not by default the only speaker the government hears.

In sum, there is no significant interference with "the sphere of intellect and spirit" where a business corporation is required to allow the transitory use of basically commercial property for communication with or among individuals or groups with a governmentally recognized role (or potential role) in the regulation or governance of that company. Put another way, insofar as PG&E's complaint is that TURN should not be able to use the billing envelope because that envelope in some sense "belongs" to PG&E, the utility is doing nothing more than reasserting the very property rights that are not strong enough to support a Fifth and Fourteenth Amendment challenge to the PUC order. *See* pp. 15-16, n.6, *supra*. Masquerading that property claim as one under the First Amendment does not change the result.

IV. The Alleged Adverse Effect On PG&E's "Editorial Freedom." PG&E suggests—relying on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)—that whatever the legal situation would be if the billing envelope had been used solely for bills and PUC-required notices this case is different because the utility usually includes

its newsletter, the *Progress*, in the envelope. In evaluating this contention, it is important to be considerably more precise than PG&E has been in evaluating the connection (or, as it turns out, the lack thereof) between the PUC order and the utility's publication of the *Progress*.

PG&E, it should be recognized at the outset, is not being ousted by the PUC order from using the billing envelope to transmit the *Progress* whenever the utility wishes to do so. This case in no way presents a situation in which a speaker is being relegated to a less favorable mode of, or to a less desirable location for, communication. PG&E will be able to continue to communicate precisely as the utility has done before, taking advantage of the fact that ratepayers must open their bills and therefore are more likely to read material mailed with the bill than material mailed separately. *Compare, e.g., City Council v. Taxpayers for Vincent*, —— U.S. ——, 52 L.W. 4594 (May 15, 1984); *Schneider v. State*, 308 U.S. 147 (1939).

PG&E is disadvantaged only to the extent the utility may by reason of the Commission access rule have to pay extra postage to transmit the *Progress* more often than at present. But there is even now no assurance that there will be space in the billing envelope for the *Progress* after the bills and PUC-required notices are included. And the postage rate structure is not, in any event, set by the PUC; PG&E might also have to pay more postage if the Postal Service decreased the weight carried for the basic mailing charge. Consequently, while the PUC order may result in increased costs to PG&E for its publication, that result is speculative, fortuitous, and controlled by factors that in the final analysis are outside PUC's hands.

Putting these considerations to the side, it is decisive in any event that the Commission access rule does not turn on whether PG&E includes the *Progress* in the billing envelope. The central reason TURN's access has been approved—to provide for an effective ratepayer voice in

PUC proceedings—would not vary in importance if PG&E had never published the *Progress* or ceased publishing the newsletter tomorrow. Nor would the billing envelope be a more or less appropriate vehicle for communication between ratepayer representatives and their constituency if PG&E never used the envelope at all as a means of transmitting anything beyond required bills and notices.

Consequently, the PUC access rule does not penalize speech nor could that rule possibly "chill" PG&E from speaking in the future by causing the utility to choose self-censorship rather than the option of speech that generates a right to reply.[11] In this regard, this case is like *Pruneyard*, *supra*, and *CBS v. FCC*, *supra*, in that the access requirement in no way turns on whether or not the complaining party itself chooses to speak, and the requirement therefore has no conceivable influence on the complainant's decision whether to speak. In contrast, in *Tornillo*, *supra*, the fact that a newspaper chose to address a particular subject in a particular way did trigger access; it was this feature of the state law that caused its invalidation:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. [418 U.S. at 257.]

The Court in *Tornillo* did add that the access requirement would impose added costs on the newspaper. 418

[11] That, as a historical matter, the PUC access rule came after the Commission had expressed concern about PG&E's use of the billing envelope space generated by ratepayer funds to transmit the utility's newsletter is entirely irrelevant. Whatever the result would have been if the PUC had, as was considered, limited PG&E's use of that envelope, the rule actually adopted, and its rationale, is completely divorced from concern with the utility's newsletter and the means of transmitting that newsletter.

U.S. at 256-57. *Tornillo* does not suggest, however, that any governmental regulations that increases the cost of printing a newspaper is a *per se* First Amendment violation. Obviously, all manner of governmental regulations may make speaking more expensive; there is no First Amendment requirement that expression be cheap, or free. *See, e.g., Taxpayers for Vincent, supra*; *U.S. Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114. (1981). Rather, the problem in *Tornillo*, as the Court was careful to state, was not the possible increase in the cost of publishing the newspaper, but the fact that the increased cost was a "*penalty on the basis of the content of a newspaper* . . . resulting from the compelled printing of reply. . ." 418 U.S. 256; emphasis added.[12]

What this analysis demonstrates, once again, is that the First Amendment cannot be used as a surrogate for fundamentally property-based concerns: Where an access requirement is triggered by one entity's speech, then there is indeed a danger to the system of free expression. But where, instead, access to private property is provided to a speaker for reasons entirely independent of any one else's communicative activity, and in no way denies the owner his right to speak, the First Amendment does not guarantee against the purely economic injury that the owner's communications costs may rise, any more than the free speech guarantee insulates communications companies from taxes uniformly imposed.

V. The PUC's Selection Criteria. PG&E's final contention is that the access rule is invalid because the PUC

[12] *Tornillo* also turns on the "intrusion into the function of editors" worked by telling a newspaper what to print. *Id.* at 258. But the billing envelope is in no sense a coherent editorial experssion. Rather, its content is already dictated by the PUC, and consists of material which is at best commercial speech, and not, as in *Tornillo*, expression at the center of First Amendment concerns. In short, one cannot sensibly speak of the "editorial control and judgment" (*id.* at 258) of the individuals who compile PG&E's bills each month. The special concern *Tornillo* exhibits for the integrity of the free press therefore plays no part here.

will necessarily have to make selections among various groups and individuals in order to administer that rule.[13] Since no group other than TURN has requested access, there is no occasion in this case to determine whether one or another selection principle would be valid. Rather, the only way this consideration could be pertinent is if there is an inviolable rule against governmental selection of certain groups of individuals as the speakers where the government regulates access to a means of communication.[14] If there is no such rule the PUC order may not be invalidated on the speculation that when

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[13] There is also the claim that the decision to permit TURN to use the billing envelope is itself impermissibly content-based, evidencing a preference for the views of TURN over those of PG&E. As we have already suggested, the record is simply inconsistent with this contention. The PUC made no judgment as to whether TURN's views are better than PG&E's, but only that TURN's view are likely to be *different* from PG&E's and are therefore likely to aid the PUC in its pursuit of all pertinent regulatory information. Of course, the Commission will eventually have to make content-based regulatory decisions and in so doing determine whose views (or what compromise) will prevail. Thus, the PUC was making a choice among speakers in the same way, and for the same reason, that this Court chooses not to hear from only one party to a case for the entire one hour allocated to oral argument—*viz.*, so that its final decision, which will choose between the positions of the parties, is as well-informed as possible. *See Madison Sch. Dist.*, 429 U.S. at 180 (Stewart, J., concurring); *Con. Ed.*, 447 U.S. at 545-546 (Stevens, J., concurring).

[14] In *Con. Ed.* this Court rejected an analogy to the public forum cases where no private party was asserting an access right to property controlled by the government and the only issue was whether a utility may itself use the billing envelope. 447 U.S. at 539-540. But this *is* a case in which the access rights of a private party (potentially, several private parties) is involved. And while the government does not *own* the property in question, if the access right is upheld, the PUC would control access to the billing envelope, just as the Postal Service controls access to mailboxes the Service does not own. *Greenburgh Civic Assn., supra.* The same general selection rules should control where the government is regulating access to its own property and where the government is regulating access to private property; both *Greenburgh* and *Pruneyard, supra,* so indicate.

faced with the question, the Commission ay choose an invalid criteria—such as its agreement or disagreement with a group's point of view—rather than a valid one.

That there is no *absolute* rule against governmental selection of speakers where the government creates a means of communication or expression for private persons could not be more clear. Three times in the last two years, in cases remarkably similar to this one in this respect, this Court has had occasion to so hold. *Perry Education Assoc. v. Perry Local Educators' Association*, 460 U.S. 37 (1983); *Minnesota State Board for Community Colleges v. Knight*, —— U.S. ——, 52 L.W. 4204 (Feb. 21, 1984); *Cornelius v. NAACP Legal Defense and Education Fund*, —— U.S. ——, 53 L.W. 5116 (July 2, 1985).

In *Perry*, the question was whether the exclusive representative of a school board's employees could have exclusive access to the school's internal mail system. The Court first distinguished the forum there from the "traditional public forum", *viz.* "places which by long tration or by government fiat have been devoted to assembly and debate." 460 U.S. at 45. In public forums, content-based or identity-based exclusion can only be justified by a compelling state interest, and then only if "narrowly tailored." *Id.* But, where, as here, the government creates a new kind of medium for communication, there is no general proscription against identity or content distinctions. Such a forum may be created "for a limited purpose such as use by certain groups . . . or . . . the discussion of certain subjects" and the government "may make distinctions in access on the basis of subject matter and speaker identity [as long as] these distinctions are reasonable" and are not "intended to discourage one viewpoint and advance another." *Id.* at 46-49. Distinctions based on the *status* of a particular person or entity in the overall system to which access is sought may not, moreover, caterogically be regarded as forbidden viewpoint distinctions and condemned as such. *Id.*, at 49. And, as both *Perry* and *Knight* demonstrate,

the government enjoys a great deal of leeway in choosing which representatives of the public to consult during the policy making process and in providing those representatives adequate means to reach their constituents.

It is unnecessary to go beyond these general principles in this case. The billing envelope is surely not a traditional public forum. And, whether that envelope is viewed as a limted public forum or as a nonpublic forum, the PUC could at least limit access to groups or individuals with a potential for participation in ratemaking proceedings, since that is the underlying reason for providing the access right. Further, should the need to do so develop, the PUC could limit the content of the inserts to that relevant to ratemaking proceedings particularly, or to public utility regulation generally. *Perry*, 460 U.S. at 46 n.7. Thus, the PUC will be able to limit acecss to the billing envelope to persons and to materials pertinent to its overall regulatory purpose; that is all that must be determined at this juncture. Because the necessity to make further distinctions among potential speakers has not yet arisen, issues of the kind that divided the Court in *Cornelius*, *supra*, are not ripe to be addressed in this case.

CONCLUSION

For the reasons stated above, the PUC Decision should be upheld.

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[14] The PUC has not in terms limited the content of TURN's speech to any particular subject. In *Perry*, the situation was the same: There was no explicit limitation to "messages related to [the union's] special legal duties." 460 U.S. at 53, n.13. The Court declined to view this failure to censor in advance as undermining the validity of the school board's grant of access. *Id.* Here, as well, the record demonstrates that TURN is a single-purpose organization, and therefore unlikely to use its privilege to discuss matters unrelated to utility-rate regulation. Further, all funds raised are limited to use in ratepayer representation in PUC proceedings. Thus, as in *Perry*, it is "[not] necessary to decide the reasonableness of a grant of access for unlimited purposes." *Id.*

Respectfuly submitted,

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